

Motion to Dismiss - April 5, 2022

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Tia Hall, individually and on behalf  
of all others similarly situated,

Plaintiff,

- V -

Case No. 21-11811

Farm Journal, Inc., d/b/a  
Farm Journal Media,

Defendant.

MOTION TO DISMISS

April 5, 2022

BEFORE THE HONORABLE DAVID M. LAWSON  
United States District Judge

Theodore Levin United States District Courthouse  
231 West Lafayette Boulevard  
Detroit, Michigan

**APPEARANCES:**

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(Appearances Continued to Following Page)

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## 1 || APPEARANCES CONTINUED:

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1      Detroit, Michigan

2      April 6, 2022

3      2:46 p.m.

4                        \*                \*

5                        THE CLERK: All rise. The United States District  
6                        Court for the Eastern District of Michigan is now in session,  
7                        the Honorable David M. Lawson presiding.

8                        THE COURT: You may be seated.

9                        THE CLERK: Now calling the case of Hall v. Farm  
10                      Journal, Inc., Case Number 21-11811.

11                      THE COURT: Good afternoon, counsel. May I have an  
12                      appearance for the plaintiff?

13                      MR. HEDIN: Good afternoon, your Honor. Frank Hedin  
14                      on behalf of the plaintiff.

15                      THE COURT: All right. You may remain seated when you  
16                      address the Court, presently, under our COVID protocol.

17                      For the defendant, please?

18                      MR. HUGET: Yes. Good afternoon, your Honor.  
19                      Michael Huget and Robert Riley.

20                      THE COURT: Which one will be arguing?

21                      MR. HUGET: I will, your Honor. Michael Huget.

22                      THE COURT: All right, Mr. Huget.

23                      Did you read Judge Ludington's opinion?

24                      MR. HUGET: Yes, your Honor.

25                      THE COURT: How is this case different?

1                   MR. HUGET: Honestly, I think Judge Ludington, with  
2 all due respect, got it wrong.

3                   THE COURT: Well, okay. So it's not a matter of  
4 trying to distinguish that opinion, you just think that a  
5 different result should result?

6                   MR. HUGET: Absolutely. If Judge Ludington had  
7 followed Michigan case law, Michigan Supreme Court, if he had  
8 followed other precedent in this court, in the Sixth Circuit,  
9 he wouldn't have come to the conclusion -- or shouldn't have  
10 come to the conclusion that simply because it's a statutory  
11 cause of action a three-year statute or a six-year statute of  
12 limitation applies.

13                  This Court, in a case we cited, the Herrin v. Dunham  
14 case, you held that a three-year statute of limitations applied  
15 to a 1983 claim in the absence of any other statute of  
16 limitations.

17                  THE COURT: Well, right, but that -- there's plenty of  
18 precedent for that. In fact, there is a Sixth Circuit case  
19 that says exactly that, that a 1983 claim is governed by  
20 Michigan's three-year statute of limitations.

21                  Do we have any Michigan case law that determines which  
22 limitation statute applies to Preservation of Personal Privacy  
23 Act claims?

24                  MR. HEDIN: None, your Honor, other than  
25 Judge Ludington's decision a few weeks ago.

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1                   THE COURT: I meant from a Michigan court.

2                   MR. HUGET: No. I don't think there have been  
3 Michigan court -- I think these have all been Federal court  
4 cases, cases in Federal court, I believe, your Honor. I'm  
5 not aware of any State court.

6                   THE COURT: Okay. Anything further then? Go ahead  
7 with your argument, if you like.

8                   MR. HUGET: Oh, thank you, your Honor.

9                   No, I just think that -- and the reason, you know,  
10 when you look at -- the courts basically indicate, the Michigan  
11 courts in particular, that when you're looking in the absence  
12 of a statute of limitations that set forth, what do you look  
13 at, when you look at the nature and origin of the claim, what  
14 does it arise from?

15                  And the courts in Michigan have said that courts  
16 determine whether the claim is founded on a consensual duty  
17 or obligation or the breach of an express promise on the one  
18 hand, or, on the other hand, whether the claim is founded on a  
19 nonconsensual duty or one imposed by law.

20                  If it's the latter, the action is generally governed  
21 by the three-year statute of limitations found in MCL 600.50 --  
22 sorry -- 5805(2).

23                  So when you turn to this case it's important to look  
24 at the nature of the claims being asserted.

25                  The closest analogy is really, this is an invasion of

1       privacy claim. Plaintiff alleges, at various points, various  
2 privacy-type injuries. And it says in paragraph 47 that she  
3 complains that Farm Journal's alleged use of her subscriber  
4 data discloses customer reading habits and preferences that can  
5 reveal intimate facts about our lives or our political and  
6 religious beliefs or our health concerns.

7           That's a privacy, that's a personal injury she is  
8 alleging, and it's clearly founded on a nonconsensual duty  
9 imposed by law. As such, this should fall within the  
10 three-year statute of limitations bucket, not the six-year.

11           The six-year cases that have all been cited where  
12 courts have determined that there is a six-year statute of  
13 limitations, when you really peel those back, they are cases  
14 that sound in contract in some way.

15           For example, the Palmer Park case that they rely on  
16 quite a bit is a penalty interest case, I believe, that arose  
17 out of a statute that applied penalty interest when insurance  
18 claims weren't paid timely enough. Insurance claims, an  
19 underlying insurance contract, not a personal right, not a  
20 personal -- invasion of a personal right or personal injury.

21           So when you look at the case law in Michigan, the  
22 plaintiff urges this Court to adopt a rule that is simply --  
23 if it's a -- if the claim arises out of a statute, you must  
24 apply the six-year statute of limitations.

25           But when you look at all the Michigan cases we cited,

1       there are numerous cases that have applied a three-year statute  
2       of limitations. The Garg v. Macomb case, a three-year statute  
3       of limitations applied to a retaliation claim brought under the  
4       Elliott-Larsen Civil Rights Act.

5           THE COURT: Well, doesn't the Elliott-Larsen statute  
6       have its own statute of limitations?

7           MR. HUGET: No, it does not.

8           THE COURT: All right.

9           MR. HUGET: Same with the Stewart's Estate v.  
10       Armstrong case, the Armstrong case that we cited.

11           THE COURT: Stewart's Estate v. Armstrong?

12           MR. HUGET: Yes. I'm sorry. I'm a little dry.

13           THE COURT: No, no problem.

14           MR. HUGET: That was a wrongful death claim. Wrongful  
15       death claims in Michigan arise by statute, not by common law,  
16       and yet they applied a three-year statute of limitations there.

17           I could go on, your Honor, but I think that's -- the  
18       job that the Court has to do is starting with the nature and  
19       origin of the claim and then go from there, not simply decide  
20       that because it's a statutory cause of action the six-year must  
21       apply.

22           And that's the essence of our argument, your Honor.

23           THE COURT: Did you take a look at Palmer Park  
24       Square v. Scottsdale Insurance?

25           MR. HUGET: Yes, your Honor.

1                   THE COURT: And tell me why that doesn't govern here.

2 You didn't deal with that very much in your brief.

3                   MR. HUGET: Yes, your Honor. Palmer Park, when  
4 you look at it in the context of the consensual duty or the  
5 nonconsensual duty, when you look at the facts of the case, the  
6 underlying claims related to the failure to pay on an insurance  
7 contract. The question became the statute of limitations  
8 applied to Michigan's penalty interest statute that kicks in  
9 when insurance claims aren't paid timely.

10                  This case falls cleanly into the bucket of a breach of  
11 an express promise bucket and not the injury to -- a personal  
12 injury or property. It arises out of the failure to pay on  
13 an insurance contract, your Honor. That's why it's  
14 distinguishable.

15                  THE COURT: Okay. Thank you.

16                  Who is arguing for the plaintiff?

17                  MR. HEDIN: I will be, your Honor. Frank Hedin on  
18 behalf of the plaintiff.

19                  THE COURT: All right. Did you file an appearance?

20                  MR. HEDIN: I did, your Honor.

21                  THE COURT: All right. Go ahead, Mr. Hedin.

22                  MR. HEDIN: Your Honor, Judge Ludington, in the  
23 Pratt v. KSE Sportsman Group opinion issued recently concerning  
24 the statute of limitations for a PPPA claim, considered and  
25 rejected all of the arguments, the same exact arguments with

1        respect to the same cause of action that the defendant is  
2        raising here.

3                    THE COURT: Well, I don't think the defendant disputes  
4        that. I think the defendant acknowledges that this is almost a  
5        cookie-cutter-type case, but he says Judge Ludington got to  
6        wrong.

7                    MR. HEDIN: Judge Ludington got it right, your Honor.

8                    THE COURT: I'm shocked to hear you say that.

9                    MR. HEDIN: As Judge Ludington's opinion explained,  
10        the Sixth Circuit in Palmer Park Square unequivocally held that  
11        the residual six-year statute of limitations in Section 5813  
12        applies to statutory causes of action.

13                  And the Sixth Circuit cited to DiPonio Construction  
14        and to Department of Environmental Quality v. Gomez, two  
15        Michigan Court of Appeals decisions, both of which hold that  
16        statutory claims across the board are subject to the six-year  
17        limitation period because those claims do not arise from a  
18        breach of a common-law duty, they arise from a statutory duty.

19                  Judge, the Sixth Circuit, in Palmer Park Square, noted  
20        that there was no controlling authority in Michigan on the  
21        question of whether the six-year period applies to a statutory  
22        cause of action, but it surveyed decades worth of jurisprudence  
23        across Michigan and came to the conclusion that in predicting  
24        what the Michigan Supreme Court would ultimately decide on the  
25        question, that the six-year period applied to statutory causes

1       of action.

2                     THE COURT: Well, how do you answer Mr. Huget's  
3 attempt to distinguish that on the basis that the claim in  
4 that case was for penalty interest that arose out of a breach  
5 of an insurance contract?

6                     MR. HEDIN: So the claim in Palmer Park Square did  
7 not -- was actually found not to arise from the contract, it  
8 was found to arise from the statute. It was a claim for  
9 untimely payment of insurance benefits.

10                  THE COURT: Under a contract.

11                  MR. HEDIN: Correct. But the Sixth Circuit held that  
12 that was not a claim under the contract, it was a claim under  
13 the statute. And notably, the Sixth Circuit in Palmer Park  
14 Square applied this consensual duty versus nonconsensual duty  
15 test in determining which statute of limitations period to  
16 apply.

17                  And the Sixth Circuit explained that that's the  
18 test that applies when you're distinguishing -- when you're  
19 determining whether to apply the breach of contract statute  
20 of limitation period or a tort statute of limitation period,  
21 either the three-year or the six-year. It does not apply in  
22 a case where there is no contractual basis for the claim  
23 whatsoever, such as in this case.

24                  For example, another case that applies the consensual  
25 versus nonconsensual breach standard is -- excuse me,

1       your Honor -- Miller Davis. And this is actually where the  
2 test comes from. That was another contract case where the  
3 Court said, well, if it's a consent -- if it's a breach of a  
4 consensual duty, in other words, one imposed by a contract,  
5 then the contract statute of limitations period applies, the  
6 six-year period, and if it's breach of a nonconsensual duty,  
7 that is, one imposed by law, whether it be common law or  
8 statutory, you have to -- then at that point you have to  
9 determine which of those two applies, the three-year or the  
10 six-year.

11           But where it's not a contract case, the test has no  
12 application. If that were the test in a -- in determining  
13 whether a statutory cause of action is subject to the  
14 three-year or the six-year period, every duty imposed by  
15 statute is nonconsensual. So under the defendant's logic,  
16 every statutory cause of action would be subject to a  
17 three-year period.

18           But we know that's not the case. Palmer Park Square  
19 says the exact opposite, that statutory causes of action are  
20 subject to the six-year period, full stop.

21           That's what Judge Ludington held. That's what the  
22 Michigan Court of Appeals held in DiPonio. That's what the  
23 Michigan Court of Appeals held in Gomez. It's what the  
24 Michigan Supreme Court held in Goldfarb.

25           And the list goes on, including, recently, a Court in

1       this District in 2009, in Purnell v. Arrow Financial Services,  
2 the Court actually addressed head on the same type of  
3 common-law analog or resemblance to common-law argument that  
4 the defendant is making here saying, well, it's -- you know, it  
5 resembles a breach or an invasion of privacy claim at common  
6 law, so it's subject to the three-year period.

7                  The Court in Purnell specifically --

8                  THE COURT: You acknowledge, do you not, that except  
9 for Pratt, none of those cases dealt with the PPPA; correct?

10                 MR. HEDIN: That's correct, your Honor.

11                 THE COURT: All right. Continue.

12                 MR. HEDIN: In Purnell the Court addressed the  
13 argument, the common-law analog argument and said the mere fact  
14 that plaintiff's allegations may in some manner be shoe-horned  
15 into a common-law tort cannot control in light of the clear  
16 directive that where a claim is for a statutory violation the  
17 six-year period in Section 5813 applies.

18                 That is exactly what we have here. This is a claim  
19 not for personal -- for damages for injury to a person or a  
20 property. This is a claim for violation of a statute, a breach  
21 of a statutorily imposed duty not to disseminate this type of  
22 personal information without consent. That's what the claim  
23 arises from. It does not arise at common law.

24                 And for those reasons, we believe that Palmer Park  
25 Square controls and that the Court should apply that holding

1 faithfully.

2 THE COURT: Thank you.

3 Mr. Huget, any further argument?

4 MR. HUGET: Your Honor, the only point I will make is  
5 that we don't take the position that every claim should apply a  
6 three-year statute of limitations.

7 THE COURT: No, I don't think he is saying that you  
8 do. I think he is saying that if we follow your logic, that's  
9 where it leads us.

10 MR. HUGET: Well, the only -- well, and I would  
11 disagree with that logic.

12 The only logic here is that their position is that  
13 every statutory claim should now be subject to a six-year  
14 statute of limitation. They are saying that's the effect of  
15 Judge Ludington's opinion, your Honor. This just can't be the  
16 case. That would be inconsistent with numerous cases that we  
17 cited earlier. I won't repeat those, but they are in our  
18 brief, and I talked about those earlier.

19 THE COURT: All right.

20 MR. HUGET: Thank you, your Honor.

21 THE COURT: Thank you.

22 It's kind of a rarity that an issue that's been teed  
23 up in motion papers is directly decided by another court only  
24 weeks before the oral argument is scheduled, and that's what  
25 we have here with the decision by Judge Ludington in the

1       Pratt case.

2                  The issues are very clear, and that is, which statute  
3 of limitations governs this dispute under this particular  
4 statute.

5                  There is no significant litigation history under the  
6 PPPA in Michigan courts, Michigan appellate courts, and there  
7 are no cases decided by the Michigan Supreme Court or the  
8 Michigan Court of Appeals that continue -- that considers  
9 which period of limitations applies under which statute.

10                 The Pratt case held that Section 600.5813 applies,  
11 which establishes a six-year period of limitations. And the  
12 significance of that -- the significance of that has to do with  
13 another -- oh, I suppose -- anomalous situation, and that is  
14 the fact that the Michigan Legislature amended the PPPA to  
15 eliminate the mandatory statutory damage award of \$5,000 per  
16 incident for events that occurred before 2016.

17                 And it is obvious to me that the plaintiff attempts  
18 to take advantage of the now-superseded statute which was not  
19 repealed, it was just amended, by claiming that the statutory  
20 violation took place prior to the amendment so that that  
21 statutory damage award would apply if liability is considered.

22                 Now, as we have discussed, the Sixth Circuit recently  
23 considered, in Palmer Park, the statute of limitations that's  
24 applied to claims brought under Michigan statutes that do not  
25 specify a limitation period, and that Court relied on the

1 Michigan Court of Appeals decision in Gomez and also DiPonio  
2 and distinguishing actions for statutory violations with  
3 actions to redress injuries resulting from traditional torts.  
4 The Court held that Section 5813's catch-all provision applies  
5 to statutory causes of action, including those for civil fines.

6 How do we deal with 1983 cases, then?

7 Under 1983, the Supreme Court has held that the  
8 analogous statute of limitations in the particular state is  
9 the one that applies.

10 Well, 1983, Section 1983 of Title 42 of the United  
11 States Code does not create a substantive cause of action. It  
12 is essentially an enabling act that allows a litigant deprived  
13 by someone acting under color of law of rights established by  
14 other provisions of law, that is, the Constitution or laws of  
15 the United States, to bring a claim.

16 And the Sixth Circuit had determined that  
17 constitutional torts, that is, torts that -- or I should say,  
18 wrongs that occur in violation of a duty imposed by the  
19 operation of law as opposed to operation of contract are the  
20 most analogous types of causes of action that trigger the  
21 three-year statute of limitations under those rules that govern  
22 Michigan tort claims.

23 Frequently, 1983 claims are referred to as  
24 constitutional torts. And so I don't believe that an analogy  
25 drawn to Section 1983 is particularly helpful in determining

1       the statute of limitation that applies here.

2                  The defendant really does not acknowledge or attempt  
3                  to distinguish Palmer Park much in its brief and it really  
4                  tends to mischaracterize the DiPonio decision on which Palmer  
5                  Park relies.

6                  DiPonio did not limit the applicability of the  
7                  six-year catch-all statute of limitations in Section 5813 to  
8                  statutory violations having no common-law analog, as the  
9                  defendant asserts. Instead, DiPonio recognized that Michigan  
10                 courts consistently have applied Section 5813 to cases where,  
11                 and I'm quoting, "The right to recovery arose from a statute  
12                 rather than a common-law right," not a statutory right that had  
13                 some analog in the common law, such as an invasion of privacy,  
14                 but a right that arose from the statute itself.

15                 The DiPonio Court then explicitly held that a civil  
16                 cause of action arising from a statutory violation is subject  
17                 to the six-year limitation period in Section 5813 if the  
18                 statute itself does not provide a limitation period.

19                 The authority that Farm Journal does cite is not  
20                 particularly apposite. Several of the cases it cites where the  
21                 Court applied a three-year statute of limitations deal with  
22                 common-law invasion of privacy claims.

23                 The plaintiff has not brought a common-law claim here.  
24                 Instead, she seeks to vindicate her statutorily conferred  
25                 rights.

1                   Farm Journal also cites several cases for the  
2 unremarkable proposition that the PPPA claims implicate privacy  
3 concerns, but the defendant has not cited any authority holding  
4 that under Michigan law courts must view every privacy-related  
5 claim as a tort for the purposes of determining the relevant  
6 statute of limitations or limitation period.

7                   In fact, all of the cases described by the PP --  
8 describe the PPPA as creating a privacy right in the respective  
9 matter.

10                  Michigan courts have rejected the common-law analog  
11 argument holding that Section 5813's catch-all six-year statute  
12 of limitations governs statutory claims notwithstanding the  
13 similarity of such claims to common-law torts, such as in the  
14 Estes matter.

15                  The Miller-Davis case, a Michigan Supreme Court case  
16 from 2011 cited by the defendant, also is distinguishable. In  
17 that case the Michigan Supreme Court considered whether the  
18 statute of limitations for tort or contract claims applies in a  
19 dispute regarding building defects.

20                  Although the Court noted that the actions founded on a  
21 nonconsensual duty or one imposed by law are generally governed  
22 by a three-year statute of limitations, it did so only in the  
23 context of comparing tortious and contractual duties. It did  
24 not hold that every action involving nonconsensual duties is  
25 governed by Section 5805's three-year statute of limitations

1       and there were no statutory claims in that case.

2                 If anything, the logic of Miller-Davis favors the  
3 plaintiff's position because the plaintiff there did not rely  
4 on any duty implied in law, but brought her claims solely under  
5 the PPPA -- that is, in this case -- and Miller-Davis suggests  
6 that the statute of limitations described in tort actions does  
7 not apply here.

8                 The plaintiff's claim is governed by Section 5813, and  
9 therefore, the claim appears to be timely for the purpose of  
10 this motion.

11                 The defendant also contends that the plaintiff lacks  
12 Article III standing because it basically sets up a catch-22  
13 for the plaintiff, stating that if the six-year statute governs  
14 then the plaintiff cannot establish that she suffered a  
15 concrete and particularized harm under the Supreme Court  
16 decisions that deal with statutory causes of action, most  
17 particularly, *Spokeo v. Robins*.

18                 The argument regarding statute of limitations, of  
19 course, is not jurisdictional, and I don't take the defendant  
20 to state that if the claim is voided by the statute of  
21 limitations that dispenses with the Article III standing  
22 argument. I think everyone agrees that statutes of limitations  
23 are essentially claims-processing rules absent legislative  
24 language to the contrary.

25                 Second, though, it is well established that a properly

1       pleaded PPPA claim confers Article III standing, and the Sixth  
2 Circuit addressed that precise issue in Coulter-Owens, another  
3 decision that was not discussed by the defendant.

4                  The Court of Appeals in that case held that Spokeo  
5 does not apply where the plaintiff alleges a violation of the  
6 PPPA's most basic substantive provision, and that is, the  
7 privacy in one's reading materials. A substantive violation  
8 occurs when a person's information is disclosed in violation of  
9 the statute.

10                 The plaintiff alleged that Farm Journal knowingly  
11 disclosed her subscriber and other demographic data, and  
12 therefore, she pleaded a cognizable injury in fact for the  
13 purpose of Article III standing.

14                 So there is no jurisdictional deficit here, subject  
15 matter jurisdictional deficit, and the statute of limitations  
16 does not bar this claim at this stage of the case.

17                 I don't know that I have -- have I given you a  
18 scheduling order in this case yet?

19                 MR. HEDIN: I do not believe so, your Honor.

20                 THE COURT: And are you seeking to certify a class?

21                 MR. HEDIN: Yes.

22                 THE COURT: All right. I think what I will do, if you  
23 have a few minutes, if you're prepared to do that, is conduct a  
24 case management conference so we can get a scheduling order on  
25 the books.

Do you have some time to do that this afternoon?

2 MR. HUGET: Sure, your Honor.

3 MR. HEDIN: Certainly, your Honor.

4                   THE COURT: We can do that in the courtroom if you'd  
5 like, off the record, or we can do it in chambers. Are you  
6 comfortable meeting in chambers or would you rather not?

7 MR. HUGET: I'm comfortable with that.

8 MR. HEDIN: Yes, plaintiff is comfortable with that.

9                   THE COURT: All right. I'll just see you in chambers  
10 and I'll recess court.

11 THE CLERK: All rise. Court is now in recess.

12 (Proceedings adjourned at 3:12 p.m.)

13 ★ ★ ★

16 CERTIFICATE OF COURT REPORTER

18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.

April 6, 2022

Date